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Nos. 93-1456 and 93-1828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,

Petitioners,

v.

RAY THORNTON, *et al.*,

Respondents.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,

Petitioner,

v.

BOBBIE E. HILL, *et al*,

Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, THE LEAGUE OF WOMEN VOTERS EDUCATION FUND, THE LEAGUE OF WOMEN VOTERS OF WASHINGTON AND MARGARET COLONY, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

The Amici are non-partisan organizations dedicated since their founding to preserving and protecting the rights of all citizens to exercise the franchise fully, freely and effectively.

The League of Women Voters of the United States (LWVUS) has more than 150,000 members and supporters, with Leagues in every state and virtually every congressional district in the United States. As a non-partisan, community-based, political organization, the LWVUS encourages informed and active participation of citizens in government and influences public policy through education and advocacy. The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. Protecting and enhancing the voting rights of all American citizens has been a central focus of the organization since its inception.

The LWVUS has consistently opposed term limits such as those imposed by Arkansas Amendment 73 because term limits violate the most fundamental of all rights in a democracy, the constitutional right of citizens to choose their governmental representatives. Amendment 73 and the term limit laws enacted thus far in fourteen other states will deprive thousands of League members and supporters of their voting and associational rights, undermining one of the central purposes of the League of Women Voters.

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[1]The consent of the parties to the filing of this brief has been filed with the Clerk of the Court.

The League of Women Voters Education Fund (LWVEF) is a non-profit, charitable, educational organization that encourages informed and active participation of citizens in government. Founded in 1957, the LWVEF provides the public as well as local and state Leagues with balanced information and opportunities for examination of election and public policy issues. The LWVEF has long worked to empower citizens through voting.

The League of Women Voters of Washington and Margaret Colony, its past president, are plaintiffs/appellees in an action challenging the constitutionality of Washington state's term limits law. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *appeal pending sub nom. Thorsted v. Munro*, Nos. 94-35222 *et al.* (9th Cir. 1994). The Washington law, Initiative Measure 573, is substantially the same as Amendment 73, and imposes identical burdens on voters, candidates, and political parties. In *Thorsted v. Gregoire*, Judge William L. Dwyer of the Western District of Washington held that the Washington term limits law violated Article I, Sections 2 and 3 of the Constitution, and the First and Fourteenth Amendments. Judge Dwyer's well-reasoned decision is directly applicable to the constitutional questions present in these cases.

STATEMENT

Arkansas Amendment 73 limits the terms of members of Congress by disqualifying multi-term incumbents from the general election ballot. The law's purpose is clearly stated in

its preamble: "Therefore, the people of Arkansas, exercising their reserved powers, "***herein limit the terms of the elected officials***." (emphasis added). The title of the law further bespeaks its purpose: "Arkansas Term Limitation Amendment."

To ensure that multi-term incumbents do not win re-election, Amendment 73 requires citizens who wish to vote for such incumbents to write-in their votes in the general election. § 3.[2] Multi-term incumbents are barred from being candidates in the primary election, and citizens may not vote for such incumbents in the primary, even by write-in. § 3.[3] In sum, there is nothing a voter can do to place the disqualified incumbent on the primary or general election ballot, and under no circumstance may the barred incumbent candidate gain the nomination of his or her party, nor a position on the election ballot, no matter how great his or her support among the voters.

SUMMARY OF THE ARGUMENT

The right of voters to elect to Congress representatives of their choice is a fundamental issue at stake in these cases. The prohibitions of Arkansas Amendment 73

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[2]Section 3 of Amendment 73 prohibits certification of the incumbent candidate and bars their appearance on the ballot. Ark. Code Ann. § 7-5-207 provides that election ballots "shall not contain the name of any candidate or person who has not been certified."

[3]Ark. Code Ann.,§§ 7-1-101 (2); 7-3-107 (1); 7-7-102; § 7-5-525.

are intended to prevent and will have the effect of preventing citizens from re-electing their incumbent legislators. Such restrictions on the freedom to choose governmental representatives violate the Constitution.

The Qualifications Clauses of the Constitution safeguard the "indisputable right [of the people] to return whom they thought proper" to the Congress. *Powell v. McCormack*, 395 U.S. 486, 535 (1969), *quoting* 16 Parl.Hist.Eng. 589 (1769). The prohibitions of Amendment 73 violate the freedom of voter choice embodied in the Qualifications Clauses, the First and Fourteenth Amendments' protection of the right to vote freely, effectively and on an equal basis with other citizens, and the right of voters to engage in political association.

ARGUMENT

I. THE VOTERS' FREEDOM TO CHOOSE FEDERAL LEGISLATORS MUST NOT BE ABRIDGED BY STATE LAWS THAT EFFECTIVELY PREVENT QUALIFIED CANDIDATES FROM BEING ELECTED.

The Court's opinion in *Powell v. McCormack* and the briefs of respondents demonstrate that the qualifications fixed in Article I, Sections 2 and 3 of the Constitution are exclusive and unalterable by any state. The historical precedents marshalled by *Powell* further demonstrate that the premise of exclusive qualifications is the freedom of citizens to elect legislators of their choosing. When a state seeks to burden exercise of the franchise in order to prevent certain disfavored

candidates from winning re-election, it violates the enduring principle undergirding the Qualifications Clauses.

A. *Powell* Affirms the Importance of the Right to Freely Choose Representatives.

As shown in *Powell*, the Framers' purpose in adopting an exclusive list of qualifications for election to Congress was to protect the "indisputable right [of the people] to return whom they thought proper" to the Congress. *Id.* This principle forms the core of *Powell's* holding, and is the basis of the *Thorsted* court's decision striking down the Washington term limits law. 395 U.S. 486, 547; 841 F. Supp. 1068, 1077-78. *Powell* repeatedly emphasizes this point:

> A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

395 U.S. at 547;

> "That the right of the electors to be represented by [citizens] of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our [English] constitution."

395 U.S. at 534 n. 65, *quoting* 16 Parl.Hist.Eng. 589-90 (1769).

> "Under these reasonable limitations [of Article I], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty, wealth, or to any particular professional or religious faith."

395 U.S. at 540 n. 74, *quoting* Madison, The Federalist Papers 326 (Mentor ed. 1961).

> "[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."

395 U.S. at 540-41, *quoting* Hamilton, 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) (hereinafter cited as "Elliot's Debates").

Powell shows that the "bitter struggle for the right to freely choose representatives," 395 U.S at 532, was resolved in favor of voter choice. The voters' freedom to elect and re-elect whom they thought proper is protected from usurpation by the states or Congress by the exclusive and unalterable qualifications of Article I.

B. The Framers Rejected Term Limits in Order to Preserve Voter Choice.

As shown in the briefs of respondents, the Framers specifically considered and rejected term limits for Congress

and the Presidency. The deliberate decision of the Framers to exclude term limits entirely from the constitutional scheme was based on the principle that citizens should be able to re-elect their representatives. The Framers achieved this principle through the twin concepts of exclusivity and uniformity of the Qualifications Clauses. The arguments raised by petitioners in support of Amendment 73 are virtually identical to the failed arguments of the Anti-Federalists over two hundred years ago.

Term limits, or "rotation in office" (as term limits were then and are now sometimes named), pre-date the Constitutional Convention of 1787. A number of states imposed term limits on their legislators, and term limits were adopted in the earlier Articles of Confederation. Delegates to the Confederation Congress were limited to service of "three years in any term of six years." Articles of Confederation, Art. V, ¶ 2 (1777). By 1787, however, these efforts at rotation in office were widely seen as a failure.[4]

At the Constitutional Convention in 1787, term limits were proposed for members of Congress and rejected. The Virginia Plan, which set the terms of debate for the Convention, proposed that members of Congress would "be incapable of re-election for the space of ____ [sic] after the expiration of their term of service [.]" 1 *The Records of the Federal Convention of 1787* at 20 (M. Farrand ed. 1966).

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[4]*See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) at 140-41, 398-99, 436-38, 477.

The number of years prior to re-eligibility for Congressional office was left blank. Fourteen days after the term limitation was proposed, the delegates voted unanimously to reject it, and deleted it from the Plan. *Id.* at 210, 217. A one-term limit on the Presidency was also proposed, and, after considerable debate, was struck from the Plan. *Id.* at 226, 230; 2 *Records of the Federal Convention* at 100-03, 119-21, 497-502, 522-25.

At the convention debates, the Framers sought to ensure that the qualifications for elected federal officials would be uniform and fixed in the Constitution. These twin principles of exclusivity and uniformity, both of which are rooted in the idea of voter freedom, informed the debates throughout. The strength and evident wisdom of these tenets prevented further qualifications from being added to the exclusive list, and triumphed over any notions of allowing Congress or the states any discretionary power to establish additional, and potentially non-uniform, qualifications. *Powell* emphasizes the importance the Framers placed on these fundamental principles. 395 U.S. at 534, 539-41, 547-48.

As Madison stated in *The Federalist No. 52*,

> The qualifications of the elected . . . being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention . . . . Under these reasonable limitations, the door of this part of the federal government is open to merit of every description[.]

The Federalist Papers No. 52 at 326 (C. Rossiter ed. 1961).

The Constitution's exclusion of term limits was one basis on which the Anti-Federalists opposed ratification, complaining that "[r]otation, that noble prerogative of liberty, is *entirely excluded from the new system of government* and the great men may and probably will be continued in office during their lives."[5] Elbridge Gerry of Massachusetts, a leading Anti-Federalist, condemned the proposed Constitution for its omission of term limits for members of Congress, complaining that nothing would prevent "the perpetuity of office in the same hands for life." *Id.* at 14-15 & n. 81.

The Framers' successful opposition to term limits and other qualifications beyond those listed in Article I was based, however, on a different and more viable notion of "liberty" - namely, the principle of voter choice. At the New York convention, Robert Livingstone reiterated this fundamental principle:

> "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."

Powell, 395 U.S. at 541 n. 76, *quoting* 2 Elliot's Debates 292-93.

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[5]Troy Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 16 & n. 82 (1992)(Letter by an Officer of the Late Continental Army, Nov. 3, 1787).

Livingstone attacked term limits as "an absurd species of ostracism--a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with the greatest faithfulness." 2 Elliot's Debates 293.

Wilson Carey Nicholas rebutted the Anti-Federalists' attempts to add qualifications on the same grounds:

> "It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state."

Powell, 395 U.S. at 541, *quoting* 3 Elliot's Debates 8.

Rather than deprive voters of the right to re-elect incumbent legislators by imposing mandatory rotation, the Framers chose to rely on frequent elections to check the power of incumbent legislators. *See*, *The Federalist No. 52* at 327; *The Federalist No. 57* at 352.

The treatment of term limits by the Constitutional Convention and during the ratification debates demonstrates that the Founders considered and conclusively rejected the concept, that the fundamental reason for doing so was to preserve for citizens the highest degree of freedom to choose their federal governmental representatives, and that their means for assuring that freedom was through the Qualifications Clauses, Article I, Section 2 and 3.

II. AMENDMENT 73 IS A QUALIFICATION, NOT A BALLOT ACCESS REGULATION.

Petitioners contend that Amendment 73 does not in fact impose a term limit qualification in violation of the Qualifications Clauses, but is instead a reasonable ballot access regulation under Article I, Section 4, the Times, Places and Manner Clause. This argument is refuted by the text and operation of Amendment 73, which shows that the intent and probable effect of the law is to prevent voters from re-electing disfavored incumbents. Petitioners' argument is also refuted by the ballot access decisions of this Court, which have consistently upheld the rights of voters to choose their representatives.

A. The Intended and Probable Effect of the Law is to Impose a Term Limit Qualification.

Amendment 73 is a qualification because it singles out and bans from the ballot a class of constitutionally qualified candidates in an express attempt to prevent their re-election. This is not a legitimate ballot access objective. A law which seeks to deny voters the freedom to return an incumbent legislator to Congress is not regulation of the times, nor the places, nor the manner of an election.

Amendment 73 forthrightly states its purpose in its preamble: "the people of Arkansas . . . herein limit the terms of the elected officials."[6] Amendment 73 limits terms of

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[6]This unambiguous statement of purpose is similar to that expressed in the Washington term limits law: "The people of

incumbents by diminishing the voting rights of those citizens who would re-elect them--relegating such voters to a write-in process in the general election.

In the primary election, the franchise is denied outright: under Amendment 73 and the Arkansas election code, write-in votes in a primary are not counted, and the incumbent cannot be certified for any election. § 3; Ark. Code Ann. § 7-5-525. Nor may the disqualified incumbent be nominated by his or her political party. Ark. Code Ann. §§ 7-1-101(2); 7-3-107(1); 7-7-102. The multi-term incumbent cannot win a place on the ballot under any circumstances, regardless of what the voters wish or do.

Petitioners argue that the law's allowance of limited write-in voting preserves enough voter choice to save Amendment 73 from the jaws of the Qualifications Clauses. This argument exalts form over substance.

The write-in "option" of Amendment 73 (and an almost identical provision in the Washington term limits law) is properly characterized as a faint "glimmer of opportunity" by the court below, P.C.A. 15a, or as a "pinhole of opportunity" by the *Thorsted* court, 841 F. Supp. at 1079. Neither the court below nor the *Thorsted* court accepted the ruse of ballot access phrasing; both arrived at the common-sense conclusion that "[d]enial of ballot access ordinarily

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Washington have a compelling interest in preventing the self-perpetuating monopoly of elective office by a dynastic ruling class." Washington Laws 1993, Ch.1, § 7 (7).

means unelectability." *Thorsted*, 841 F. Supp. at 1081.[7] Both courts acknowledged the "realities of the election process" cited by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), where this Court similarly concluded that write-in voting is not an adequate substitute for having the candidate's name appear on the ballot. *Id.* at 799-800 n. 26.[8]

Petitioners cite *Storer v. Brown*, 415 U.S. 724, 737 n. 7 (1974) and *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) as evidence of this Court's tolerance of ballot disqualification so long as a write-in opportunity is preserved. To the contrary, the Court in these cases merely noted that a write-in option was yet one more route available to the affected candidates. *Id.* In both cases, the candidate could win a place on the ballot if he or she disaffiliated from a political party *(Storer)* or met a five percent petition requirement

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[7]Petitioner U.S. Term Limits ("USTL") argues that the court's conclusion in *Thorsted* that the write-in option in Washington's term limits law was a "pinhole of opportunity" was not supported by the record. USTL Br. at 17, n. 21. To the contrary, even USTL's own expert witness in *Thorsted* and in this case agrees that a write-in candidacy is more difficult to win than one in which a candidate's name is on the ballot, and that only five write-in candidacies in 170 years have succeeded for election to the House of Representatives. USTL Br. at 18. *Thorsted's* "pinhole of opportunity" conclusion, like the "glimmer of opportunity" conclusion of the court below, are conclusions based on common knowledge, common sense, and a record including petitioner's own evidence.

[8]*See also, Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974); *Burdick v. Takushi*, 112 S.Ct. 2059, 2065 n. 7 (1992)("it is clear under our decisions that the availability of a write-in option would not provide an adequate remedy.").

(Jenness). The Court has never held or even suggested that a write-in option is an adequate remedy for a state's complete ban on ballot access to a candidate who clears all the procedural hurdles placed by the state as part of the election process.

Both the court below and the *Thorsted* court properly concluded that ballot access phrasing cannot save a measure whose plain purpose is to impose a qualification:

> The [Washington] Initiative would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement. A state may not do indirectly what the Constitution forbids it to do directly. *Frost & Frost Trucking Co. v. Railroad Com'n of California*, 271 U.S. 583, 593-94 (1926).

841 F. Supp. at 1081.

The logical extension of petitioners' ballot access argument--that a measure admittedly designed to prevent an otherwise qualified candidate from being elected to Congress can be cured of its constitutional infirmities through the inclusion of a write-in option--makes a sham of those Qualifications Clauses which the Constitutional Convention debated so earnestly.

If petitioners' argument were to be accepted, then a state could avoid the Qualifications Clauses simply by barring qualified but disfavored candidates from the ballot instead of declaring them ineligible for the office. As long as some form

write-in voting is allowed, these ballot bans would avoid constitutional scrutiny under the Qualifications Clauses.

If the ballot access device were a cure for an otherwise unconstitutional qualification, then a state could decide, for example, that it has a compelling interest in securing experienced legislators, and require candidates for Congress to have served in the state legislature before being eligible for the election ballot in a congressional race. *See Thorsted*, 841 F.Supp. at 1078-79. Or with appropriate findings, a state might enact a law barring lawyer-candidates from the ballot. In each of these cases, the state might well be able to frame a compelling reason for the ballot exclusion, but the fact remains that such "ballot access" laws, like term limits, are intended as qualifications which will deprive citizens from freely choosing who shall govern them.

Moreover, if states are allowed to "dress eligibility to stand for Congress in ballot access clothing," P.C.A. 15a, then a host of different qualifications for election to Congress could exist across the nation, depending on the current animus of each state's majority. This would mock the principle of uniformity so important to the Framers, and vest in state legislatures the "very dangerous powers of exclusion" which *Powell* explicitly denied to the Congress. *Powell*, 395 U.S. at 533-34, 540 & n. 75.

The Framers' prescient warnings about the dangers of exclusion and the need for uniformity in qualifications are well illustrated in the consequences of term limits laws, which would impose non-uniform and exclusionary term limit

qualifications on members of Congress for various durations (and on some members not at all), thereby producing the very exclusion and national inconsistency the Framers specifically sought to avoid.

Surely there is a threat to representative democracy when voters seeking to exercise the franchise are restricted to write-in voting despite that fact that the candidate for whom they are voting can meet all requirements imposed by the election process itself and is otherwise entitled to a place on the ballot. The result is that Mr. Madison's door to election, intended to be "open to merit of every description," has been closed. *The Federalist No. 52* at 326.

Amendment 73 is a term limit qualification imposed by the state in violation of Article I, Sections 2 and 3 of the Constitution.

B. The Court's Ballot Access Decisions Show that the Law is a Qualification, Not a Manner Regulation.

Petitioners' reliance on ballot access phrasing to save Amendment 73 also fails in light of this Court's consistent ballot access jurisprudence. This Court has never allowed voter choice to be subsumed by a state interest such as that expressed in Amendment 73: preventing the elections of "entrenched" incumbents who "remain in office too long." Preamble to Amendment 73.

Although the Constitution bars the states from imposing substantive restrictions on *who* may be elected to Congress, it permits reasonabie state regulation of *how*

elections are conducted under the Times, Places and Manner Clause of Article I, Section 4. *Thorsted*, 841 F. Supp. at 1079. Under this Clause, the power of states to limit ballot access is confined to instances where the state has a legitimate interest in regulating the process and manner of elections.

Amendment 73 is not such a regulation. The law patently seeks to determine the outcome of an election by barring constitutionally qualified candidates from all routes to the ballot and denying voters any chance to place them on the ballot. The states have no legitimate interest in pre-determining the losers or winners of an election, nor do they have the power to do so under the Times, Places and Manner Clause. No state ballot access statute has ever been held constitutional that so patently attempts to *effect*, rather than *affect*, the results of an election.

Amici do not dispute that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). In *Storer*, this Court affirmed that the state has a legitimate interest in "maintaining the integrity of the various routes to the ballot." 415 U.S. at 733. The Court has upheld other state ballot access laws to combat party factionalism and to ensure that election winners are chosen by a clear majority.[9] But this Court has

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[9]*See Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas*

consistently invalidated unduly restrictive measures which infringe on voter choice and are neither even-handed nor generally applicable, and not designed to protect the election process itself.[10]

As the *Thorsted* court observed, all of the state ballot access laws upheld by this Court have one thing in common: the laws "have been open to compliance by candidates who take the necessary steps, or make the required showing, in the election process itself." 841 F. Supp. at 1081. The corollary to this truth is that the Court has never permitted the state to restrict, for the stated purpose of impeding a candidate's or a class of candidates' election, the freedom of voters to advance a candidate to a position on the ballot.

Unlike valid ballot restrictions that maintain the integrity of various routes to the ballot, Amendment 73 *closes* all routes to the ballot for the disfavored incumbent. Incumbents may affiliate or disaffiliate with political parties, fulfill any and all vote percentage requirements, clear waiting periods, satisfy early or late filing deadlines, pay filing fee requirements, meet petition requirements, and still be barred from the ballot. Multi-term incumbents cannot get on the

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v. White, 415 U.S. 767 (1974), *Burdick v. Takushi*, 112 S.Ct. 2059 (1992).

[10]*See, Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *Anderson v. Celebrezze*, 460 U.S. at 805-06; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Lubin v. Panish*, 415 U.S. 709, 718-19; *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *Tashjian v. Republican Party*, 479 U.S. 208, 229 (1986); *Norman v. Reed*, 112 S.Ct. 698 (1992).

ballot by primary victory, party nomination, independent candidacy, petitioning, or appointment.

Citizens may attempt to petition, convene, nominate, or vote for the incumbent, but their votes are not counted in the primary; their nomination cannot be certified; and there is nothing even a majority of the voters can do to place the multi-term incumbent on the ballot.

Amendment 73 in fact runs directly counter to those legitimate state interests identified in *Storer:* the Law *promotes*, instead of prevents, "splintered parties and unrestrained factionalism" by interfering with the rights of voters and political parties to nominate their chosen candidate; the Law *destabilizes* the electoral process instead of insuring the "stability of its political system," since candidates with demonstrable public support (e.g., incumbents or previous multi-term officeholders) are not allowed on the ballot; the Law *winnows out* the chosen candidate of the prior elections instead of "winnowing out all but the chosen candidates." 415 U.S. at 731-36.

As the *Thorsted* court concluded, Amendment 73 "is aimed not at achieving order and fairness in the process but at preventing a disfavored group of candidates from being elected at all." 841 F.Supp. at 1068. No ballot access case cited by petitioners has permitted a state to determine the outcome of an election by denying the choice of a majority of the electorate (e.g., in a primary) a place on the ballot in the general election. That is precisely what Amendment 73 is designed to do.

III. AMENDMENT 73 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

If as petitioners assert Amendment 73 is not a qualification, it necessarily follows that the disfavored incumbents targeted by the law are fully qualified candidates. The state must therefore show that it is permissible under the First and Fourteenth Amendments to severely discriminate against fully qualified candidates.

A. Amendment 73 is Subject to Strict Scrutiny.

In deciding the constitutionality of Amendment 73, this Court must weigh the degree to which the Amendment infringes upon voting and associational rights against the state interests Amendment 73 is designed to promote. *Burdick v. Takushi*, 112 S.Ct. 2059, 2063 (1992). Restrictions on fundamental rights such as those imposed by Amendment 73 must be narrowly drawn to advance a compelling state interest. *Id.*

The right to vote is not only fundamental but is also protective of all rights and privileges under the Constitution. State efforts to impose substantial burdens upon exercise of the franchise have consistently invoked the strict scrutiny of this Court. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Bullock v. Carter*, 405 U.S. 134, 144 (1972). Amendment 73 does not survive strict scrutiny.

B. Amendment 73 Violates the Right to Vote Freely and Effectively.

This Court has often stated that "voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In *Williams v. Rhodes*, the Court struck down an Ohio statute which burdened the same rights at issue here:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights -- the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

393 U.S. at 30.

Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court affirmed that:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Id. at 555.

The means by which Amendment 73 carries out its stated purpose of promoting rotation in office is to prevent citizens from voting in the primary election for a disqualified incumbent, and confining exercise of the franchise to write-in balloting in the general election. These severe restrictions on

the franchise plainly violate the fundamental rights of citizens to vote freely and effectively.

Amendment 73 is not narrowly drawn to advance a compelling interest. The state does not have any legitimate interest, much less a compelling one, in handicapping certain candidates because they enjoy too much support from the electorate. If the state is truly interested in "leveling the electoral playing field" so that elections are more competitive and incumbents less "entrenched," it should promote more voting, not less.[11] Barring popular candidates from the ballot so that voters will not return them to office is not a narrowly tailored solution to the alleged "problem" of an electorate which too often re-elects their congressional representatives.

Petitioners argue that there is no injury to voting rights since Amendment 73 allows voting, albeit by write-in, for the ballot-barred incumbent in the general election. This Court has concluded, however, that write-in voting is not an adequate substitute, *Anderson v. Celebrezze*, 460 U.S. at 799 n. 26, and that the right to cast a write-in ballot is of a sufficiently lesser constitutional dimension when compared to actual access to the ballot that it may be banned altogether where the latter is readily available. *Burdick v. Takushi*, 112 S.Ct. at 2067.

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[11]Similarly, the best means for the state to promote wise decisions by the citizenry is "to open the channels of communication rather than to close them." *Anderson v. Celebrezze*, 460 U.S. at 798, quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)

As shown, the logical extension of petitioners' argument--that write-in voting is a sufficient cure for exclusion from the ballot--would allow the state to order the results of any election through manipulation of the ballot. The right to vote is more than simply the right to cast a write-in ballot. The "realities of the election process" strongly suggest that a write-in vote for a disfavored, ballot-barred candidate is less effective, and a less meaningful exercise of the franchise, than freely choosing among qualified candidates on the ballot.

Petitioners also contend that the right to vote is not absolute, and that candidates do not have a fundamental right to a place on the ballot. It is true that the right to candidacy is not *per se* a fundamental right, and that voters may not always find their ideal candidate on the ballot. But the right to a place on the ballot is a basic constitutional freedom and is intertwined with fundamental voting rights: "[t]he right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish*, 414 U.S. at 716.

Unlike the voter plaintiff in *Burdick v. Takushi*, the voters in this case do not wish to vote for "Donald Duck," nor do they assert a right to do so. 112 S.Ct. at 2065. Rather, the voters here wish to vote for qualified candidates who possess demonstrable support among the electorate.

When the state burdens candidacy rights, it necessarily burdens the rights of those who wish to vote for the disfavored candidate. The "rights of voters and the rights of

candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. at 143. Although petitioners may not have an absolute right to vote for every candidate of their choosing, they do have the right to vote for candidates who are not targeted by the state for defeat.

Amendment 73 is "neither neutral, nor nondiscriminatory, nor narrowly drawn . . . it seeks to determine the outcome, not the procedures." *Thorsted*, 841 F.Supp. at 1083. As held by the *Thorsted* court, term limit laws such as Amendment 73 violate the First and Fourteenth Amendments:

> The state interest claimed is to prevent congressional incumbents from winning; but the Constitution places that decision with the voters in each election, not with a state government . . . . [the law] hobbles a few runners to make sure they lose. A state may not constitutionally do that, just as it may not bar qualified runners from the track.

Id.

C. Amendment 73 Violates the Right to Equal Protection.

The Equal Protection Clause confers the right upon voters and the obligation upon the state to ensure that qualified voters and candidates participate on an equal basis with other voters and candidates in the electoral process.

Lubin v. Panish, 414 U.S. at 713-14. This principle "flows naturally" from the Court's recognition that

> [l]egislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislators are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id., quoting *Reynolds v. Sims*, 377 U.S. at 562.

Amendment 73 effectively establishes two tiers of voting rights for citizens in Arkansas: those who do not support disqualified incumbents may have their votes counted in the primary, and may choose from candidates on the ballot in both the primary and the general elections. Those who support disqualified incumbents have no opportunity to vote for them in the primary, and must write-in their votes in the general election. Although voters in this second tier can still vote, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizens vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. at 555.

If the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system, then Amendment 73 crushes that bedrock through invidious discrimination. Voters who wish to vote for an incumbent are reduced to second class citizens by Amendment 73--in the voting booth,

on a campaign trail, in the convention halls--for all forms of political action.

The state has no leeway under the First and Fourteenth Amendments to set up flagrantly discriminatory election rules for the sole purpose of favoring some candidacies, and some voters, over others.

D. Decisions Upholding Term Limits on State Officials Are Not Applicable.

Petitioners contend that Amendment 73 does not violate the First and Fourteenth Amendments because several courts, including the one below, have upheld term limits on state and local officials against such challenges.[12] These state term limit cases are inapplicable here for several reasons. First, the cases concern the plenary power of states to specify the qualifications for their own offices, not federal offices. The state has a far greater interest in regulating its own offices than it does in imposing limits on the terms of members of Congress.

Second, petitioners cannot have it both ways. The laws at issue in the state term limit cases are direct, absolute term limit qualifications. Petitioners argue that Amendment 73 is not such a term limit qualification, but a mere ballot access measure. Amendment 73 is either a qualification or not. If it is a qualification, it is unconstitutional under the Qualifications Clauses. If it is not a qualification, then petitioners must justify the law's discrimination against fully

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[12] *See* cases cited in USTL Br. at 22-23 n. 27.

qualified candidates under the First and Fourteenth Amendments. In so doing, petitioners cannot legitimately rely on cases which concern qualifications for state offices.

E. Amendment 73 Violates the Fundamental Associational Rights of Voters Exercised Directly or through Political Parties.

In addition to violating fundamental voting rights, Amendment 73 abridges the right of citizens to engage in political association. By denying citizens the right to vote in the primary for an incumbent, and the right to associate for and nominate the candidate of their choice, Amendment 73 violates the First and Fourteenth Amendments.

Voters, after all, "can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 414 U.S. at 716. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his [or her] policy preferences on contemporary issues." *Id.* Excluding disfavored incumbent candidates from the ballot and from party nomination "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. at 787-88.

Freedom of association also means that a political party has the right to "identify the people who constitute the association," and to select a "standard bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S.

214, 224 (1989). The Court has repeatedly held that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986), *quoting Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981).

This Court recognizes that a central purpose of political parties is the role they play "in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. Amendment 73 not only impedes this vital flow of information to voters (since the incumbent cannot run in the primary nor be nominated as the party's standard bearer), but confuses voters and precludes their identification with the candidate who represents the party and therefore constitutes the association.

For example, in a year where a Republican incumbent has been disqualified from the ballot, voters in Arkansas might be faced with three candidates in the general election; the Republican nominee, the Democratic nominee and the write-in incumbent candidate who has been the Republican nominee and standard-bearer in the past several elections.[13]

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[13]The Washington term limits law similarly bars voters and political parties from nominating ballot-barred incumbents by prohibiting their declarations of candidacy. However, in Washington write-in voting is permitted in the primary election. Thus it is possible for an incumbent to win the primary election and be nominated by the voters and his or her party, only to be disqualified from the ballot and the party nomination by the term limits law. Voters in the general election could be faced with a bewildering choice of "official" party nominees and "non-official"

Under Arkansas law, disqualified incumbents are further excluded from official campaign information, such as the official announcement listing of qualified candidates for the general election. Ark. Code Ann. §§ 7-5-203, 206.[14]

The practical consequences of Amendment 73 thus not only plainly violate fundamental associational rights, but also play havoc with the efforts of organizations such as the League of Women Voters to educate voters and encourage their participation in the political process.

Finally, the fact that Amendment 73 wholly denies voters and political parties the right to nominate a candidate for election to Congress shows that the law is clearly unconstitutional under *Eu v. San Francisco County Democratic Cent. Committee* and *Tashjian v. Republican Party of Connecticut*. These decisions established broad protection for political parties from state regulation of their election-related activity, and affirmed the rights of voters to select nominees of their choosing without interference from the state. The basis for the party's broad immunity from state interference in their affairs and voters' freedom to choose

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nominees. *See* Rev. Code of Wash., Chaps. 29.42.010; 29.18.150; 29.27.020, 29.15.150; 29.18.160.

[14]The Washington state term limits law similarly excludes the disfavored incumbent from all official notices of primary elections and the listing of candidates seeking election, and bars them from the Voters Pamphlet mailed to every registered voters home. Rev. Code of Wash., Chaps. 29.04.180; 29.80.010, 020.

derives from the fundamental importance of the associational interests at stake.

The extent of interference by Amendment 73 with the associational rights of the voters, whether directly or through political parties, well exceeds the state intrusions struck down by the Court in *Eu* and *Tashjian*. Amendment 73 so patently violates these associational rights that it is unconstitutional on this basis alone.

CONCLUSION

The freedom of voters to choose their congressional representatives is the principle that underlies the exclusive listing of qualifications in Article I and the First and Fourteenth Amendment protection of the right to vote and associate: Amendment 73 deprives voters of this freedom by disqualifying certain disfavored candidates from the ballot.

For the reasons stated, the decision of the Supreme Court of Arkansas that Arkansas Constitutional Amendment 73 violates the United States Constitution should be affirmed.

Respectfully submitted,

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